

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

NATHAN KOZAK,)	
ANDREW KOZAK AND)	
ANNE-MARIE KOZAK,)	
Plaintiffs,)	
)	CIVIL ACTION NO.
v.)	02-11432-DPW
)	
SHRINE OF OUR LADY OF)	
LA SALETTE, INC.,)	
Defendant.)	

MEMORANDUM AND ORDER

December 28, 2005

Confronted with the prospect of a firm trial date, the plaintiffs' counsel chose to seek dismissal pursuant to Fed. R. Civ. P. 41(a)(2), in order to pursue claims in state court. The defendant in response proposes the following conditions to such a dismissal:

- "1. Dismissal of claims by plaintiff Nathan Kozak, without prejudice subject to conditions below.
2. Dismissal with prejudice as to all claims by plaintiff Andrew Kozak, which are now time-barred.
3. Dismissal with prejudice as to all claims by plaintiff Anne-Marie Kozak, which also are time-barred.
4. Defendants are not bound by the District Court's ruling concerning the liability release form. Said rulings are not binding, and the Shrine and its agents are free to re-litigate any issues related to the release and/or to use said release as evidence at any later trial.

5. Plaintiff Nathan Kozak must commence his subsequent action against the Shrine and/or any other individual agent(s) or related institution(s) within forty-five days from the entry of dismissal by this court.

6. If plaintiff Nathan Kozak files a subsequent lawsuit, no discovery shall be had by any party currently named or previously named in the instant lawsuit, and the parties in the subsequent lawsuit shall use the discovery documents and deposition transcripts from the instant litigation."

Plaintiffs' counsel raises a substantial objection only to proposed condition 4. On reflection, I will not attach proposed condition 4 and offer the following observations regarding its purport.

Because this case is not being resolved by a final judgment substantively disposing of the underlying claims, an interlocutory order--such as any determination with respect to the release--is not as a matter of law precluded from relitigation. To the degree that the release determination may be viewed as law of the case, I observe that "law of the case is an amorphous concept," Arizona v. California, 460 U.S. 605, 618 (1983); cf. Harlow v. Children's Hospital, 2005 WL 3470648 *2-*3 (1st Cir. Dec. 20, 2005). I decline to impose any direction upon resolution of issues in litigation by the parties in any other forum. It is for the state court to determine whether and, if so to what extent, it will adopt analyses, including analysis of the question of the release, that would presumptively have been

applied if the case had continued in this Court.

Accordingly, the plaintiffs' motion to dismiss pursuant to Fed. R. Civ. P. 41(a)(2) is hereby ALLOWED subject to the following conditions:

A. That dismissal of claims by plaintiff Nathan Kozak be without prejudice subject to conditions below.

B. That dismissal be with prejudice as to all claims by plaintiff Andrew Kozak, which are now time-barred.

C. That dismissal be with prejudice as to all claims by plaintiff Anne-Marie Kozak, which also are time-barred.

D. That plaintiff Nathan Kozak must commence against subsequent action against the Shrine and/or any other individual agent(s) or related institution(s) within forty-five days from the entry of dismissal by this court.

E. That, absent some specific order of the state court, should plaintiff Nathan Kozak file a subsequent lawsuit, no additional discovery, apart from the continuing duty of supplementation, shall be had by any party currently named or previously named in the instant lawsuit, and the parties in the subsequent lawsuit shall have the right to use the products of discovery from the instant litigation, as if they had been obtained in the subsequent law suit.

/s/ Douglas P. Woodlock

DOUGLAS P. WOODLOCK
UNITED STATES DISTRICT JUDGE